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No. 80-1429

In the Supreme Court of the United States

October Term, 1980

DUANE YOUNGBERG, Individually and in His Official Capacity as Superintendent, Pennhurst State School and Hospital, and RICHARD MATTHEWS, Individually and in His Official Capacity as Director of Resident Life, Pennhurst State School and Hospital, and MARGUERITE CONLEY, Individually and in Her Official Capacity as Unit Director, Unit 9, Pennhurst State School and Hospital,

Petitioners

v.

NICHOLAS ROMEO, an Incompetent, by His Mother and Next Friend, PAULA ROMEO,

Respondent

AMICI CURIAE BRIEF in Support of the Grant of a Writ of Certiorari on Behalf of Alabama, American Samoa, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Washington and West Virginia

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit has not yet been reported.

The opinion of the United States District Court for the Eastern District of Pennsylvania on the motion to dismiss is unreported. Both opinions are reproduced in the appendix to the petition for writ of certiorari of Duane Youngberg *et al.*

CONSENT OF THE PARTIES

Consent of the parties is not required since this brief is presented on behalf of the States, Commonwealths or Territories of Alabama, American Samoa, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Washington, and West Virginia, by their respective Attorneys General (hereinafter *Amici*). See U.S.S.Ct. Rule 36.4.

INTEREST OF AMICI CURIAE

In *Romeo*, the Third Circuit pronounced new constitutional rights for mentally retarded persons. The interest of *Amici* stems from their role in providing services to the mentally retarded and the significant impact of this decision on those responsibilities.

As a matter of "substantive due process", the Court of Appeals declared that institutionalized mentally retarded persons have: (1) a right to receive that treatment which is acceptable in light of present medical or other scientific knowledge and the least intrusive treatment available under the circumstances, (2) a right to be free of restraints, whether for treatment or protection, absent a showing of compelling necessity; and (3) a right to be protected from harm absent a showing of substantial necessity. These rights are apparently in addition to the statutory right to treatment in the least restrictive alternative found by the same court to be enforceable by a private cause of action under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6001 *et seq.*, in *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 84 (3d Cir. 1979) (*en banc*), *cert. granted*, 100 S.Ct. 2984 (1980) (argued Dec. 8, 1980).

Nearly all of the states have been confronted with litigation based on the constitutional claims raised in *Romeo* and/or the statutory claims presented in *Penn-*

hurst.[1] If this Court decides the statutory issues in *Pennhurst* without reviewing the *Romeo* constitutional issues, uncertainty will continue in this area of law until each of the other courts of appeals passes upon these questions.

Moreover, should the decisions of the Third Circuit stand, additional lawsuits are inevitable. Considering that in 1976 there were over 150,000 mentally retarded persons residing in state institutions,[2] the potential for future federal court litigation of similar issues is staggering.

Finally, states have a substantial interest in obtaining the clearest and earliest possible guidance on the constitutional issues in order to effectively plan for

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[1] *See, e.g., Simmons v. Thorne*, No. H-80-91 (D. Conn.); *Connecticut Association of Retarded Citizens, Inc., v. Thorne*, No. H-78-653 (D. Conn.); *Illinois Association for Retarded Citizens v. Thompson*, No. 80-C-0914 (N.D. Ill.); *Amy R. v. Thompson*, No. 80-3332 (C.D. Ill.); *Welsch v. Noot*, No. 4-72-451 (D. Minn.) (formerly *Welsch v. Likens*, 550 F.2d 1122 (8th Cir. 1977)); *Smith v. Smith*, No. 79-4129-CV-C (W.D. Mo.); *O'Toole v. Smith*, No. 78-943-Cl (W.D. Mo.); *Goodman v. Parwatikar*, No. 76-1113-C-(1) (E.D. Mo.); *Association of Retarded Citizens of North Dakota v. Link*, No. A1-80-141 (D.N.D.); *New Jersey Association for Retarded Citizens, Inc. v. Klein*, No. 79-1632 (D.N.J.); *Scott v. Plante*, No. 73-1052 (D.N.J.); *Garrity v. Gallen*, C.A. No. 78-116 (D.N.H.); *Barbara C. v. Moritz*, No. C-2-77/-887 (D.C. Ohio); *Henkin v. Department of Social Services*, 78-4088 (D.S.D.); *Washington Association for Retarded Citizens v. Thomas*, No. C-79-1235V (W.D. Wash.); *Medley v. Ginsberg*, C.A. No. 78-2099 CH (S.D.W.Va.).

[2] *See Halderman v. Pennhurst State School and Hospital*, 466 F. Supp. 1295, 1300 n. 7 (E.D. Pa. 1978) (subsequent history deleted).

the provision of services to the mentally retarded in the future. At present, states spend millions of dollars on services to the mentally retarded each year. For state policymakers and administrators to effectively make short and long range plans, it is imperative that states know whether the constitutional standards created in *Romeo* are valid and will, therefore, be applicable elsewhere in the country.

STATEMENT OF THE CASE

Amici hereby incorporate by reference the Statement of the Case contained in the petition for writ of certiorari of Duane Youngberg *et al.*[3]

[3] *Amici* are not familiar with any of the events on which Nicholas Romeo asserts liability in this action. Thus, no opinion is taken with respect to his particular situation or conditions generally at Pennhurst.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court Below Raises Significant Questions as to the Scope of Substantive Due Process and the Constitutional Rights of the Mentally Retarded

While this Court has cautioned that courts are poorly equipped to make medical judgments, *Parham v. J. R.*, 442 U.S. 584, 606-09 (1979), the Third Circuit appears to disagree. The new constitutional rights created by the court below would require judges and juries to examine all facets of care of the mentally retarded in institutions to determine if "treatment" is actually being provided, and whether treatment is both acceptable in light of present medical knowledge and the least intrusive under the circumstances. Moreover, the court has somehow determined that any use of restraints is presumptively punitive, slip op. at 13, notwithstanding federal regulations recognizing their use in treatment. 42 C.F.R. §442.438. In light of the present state of medical and scientific knowledge, these are controversies which the federal courts should be slow to enter. *See O'Connor v. Donaldson*, 422 U.S. 563, 577-78 (1975) (Burger, C.J. concurring); *Romeo, supra*, slip op. at 52 (Seitz, C.J., concurring).

Moreover, by this holding, a constitutional malpractice cause of action has been created despite warnings to the contrary from this Court. *See, e.g.*,

Estelle v. Gamble, 429 U.S. 97, 106 (1976).[4] Under the treatment standards pronounced by the Third Circuit, trial of a case involving these issues would be very similar to trial of a state-law malpractice case, with one exception. By requiring defendants to demonstrate "compelling necessity" for use of restraints, "substantial reasons" for any attacks on residents, and use of the "least intrusive treatment available under the circumstances", slip op. at 41-42, the burden of proof has been largely shifted to the defendants. Thus, the court has created what amounts to strict liability in constitutional law.

Finally, the specific rights and standards developed by the Third Circuit are, in various respects, overlapping, inconsistent and contrary to this Court's analysis in recent cases. The conflicting nature of these rights is perhaps best illustrated by attempting to determine where one resident's right to be free of restraints and to receive the least intrusive treatment available ends and another patient's right to be protected from harm begins. As to the use of a "compelling necessity" standard in evaluating the use of restraints, this approach appears to be inconsistent with this Court's rejection of such an approach in *Bell v. Wolfish*, 441 U.S. 520 (1979) (evaluation of conditions of pre-trial detention).

In sum, serious questions as to the scope of due process under the Fourteenth Amendment have been

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[4] A related issue—whether simple negligence can form the basis of an action under 42 U.S.C. §1983—is presently before the Court. *Parratt v. Taylor*, No. 79-1734, *cert. granted*, 101 S.Ct. 315 (1980).

raised by the decision in *Romeo*. While *Amici* do not attempt in this brief to articulate what standards should be applied in these circumstances, these questions can best be explored by this Court reviewing the *Romeo* decision.

II. The Decision of the Court Below Creates Problems for All States in Planning and Providing Services to the Mentally Retarded

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The uncertainty created by the *Romeo* decision affects every facet of provision of services to the mentally retarded. For example, difficulties can be expected in recruiting top-notch professionals to work in state institutions in light of the possibility of monetary liability under the Third Circuit's standards. Moreover, budgeting the amount of money necessary to provide services under the *Romeo* standards will become a very speculative endeavor. In his concurring opinion in *Romeo*, Judge Aldisert cogently addressed the problems raised by the majority's decision:

> It has been almost twenty years since I faced a client across a law office desk. But were I to be placed in that position today, my advice would probably go like this: if you are contemplating a position as an attendant in a mental hospital, seek another job; there is simply too much unpredictability in the law governing your conduct. If you are a physician, make certain that the state's malpractice insurance policy includes a clause protecting you from the new 'constitutional torts' manufactured today by the Third Circuit Court of

> Appeals. If you are an insurance carrier, set your premiums high, anticipating fully and completely the open-ended notions of 'substantial' and 'compelling' necessity and 'least intrusive treatment.' If you are a governor or state legislator, cut back and retrench institutional programs for the mentally retarded, because the potential for lawsuits has now increased geometrically, with corresponding demands on the tax base to support the costs. If you are a parent with a retarded child, I simply feel sorry for you. The sincere effort to provide financial relief for personal injuries suffered by retarded persons has been accomplished at an enormous social cost. In striking the balance between how seriously the complainants are being hurt and how much it will cost to afford them more relief than is presently available under state tort law, the balance has been struck so vaguely that state institutional programs, already diminishing, will be curtailed further. Given the recent political currents, there simply are not, and will not be, sufficient tax dollars, state or federal, to give the defendants adequate financial protection to meet the illusory standards promulgated today.

Slip op. at 68.

III. Litigation Pending in Other States Would Benefit From an Early Ruling on the Issues Addressed by the Court Below

At present, there are inconsistent and varying adjudications with respect to the constitutionally and statutorily mandated requirements which a state must meet in providing services to the mentally retarded. *See, e.g., Scott v. Plante*, Nos. 80-1314/1315, 80-1596 (3d Cir., filed Feb. 5, 1981); *Goodman v. Parwatikar*, 570 F.2d 801 (8th Cir. 1978); *Morales v. Turman*, 562 F.2d 993 (5th Cir. 1977), *rev'd and rem'd on other grounds*, 430 U.S. 322 (1977) (*per curiam*); *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). By the decision in *Romeo*, more uncertainty has been added to this frequently-litigated area of the law. As a result, costly, complex, class-action litigation on these issues will continue and states will be hampered in their planning for the delivery of services to the mentally retarded or developmentally disabled.

Thus, all states would directly benefit by a definitive statement from this Court as to the requirements to be imposed on them under the Constitution and as to the relationship between those obligations and their obligations and duties under the Developmentally Disabled Assistance and Bill of Rights Act.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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